Supreme Court, U.S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1977

FREDERICO RODRIGUEZ,

Petitioner,

against

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

Respondent.

LUIS PEREZ,

Petitioner,

against

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

against

OVE SKOU, R. A.,

Respondent.

Supplemental Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MORRIS CIZNER
Attorney for Petitioners
160 Broadway
New York, N. Y. 10038

INDEX TO APPENDIX.

Page

Appendix C--Order of Affirmance by U. S. Court of Appeals for Reasons Stated in Rodriguez v. Compass Shipping Co. Ltd., et al. . . 1c

Appendix D--Order of Affirmance by U. S. Court of Appeals for Reasons Stated in Rodriguez v. Compass Shipping Co. Ltd., et al. . . 1d

Appendix E--Opinion of U. S. District Court, Southern District of New York, by Robert L. Carter, U.S.D.J. 1e

Appendix F--Opinion of U. S. District Court, Southern District of New York, by Morris E. Lasker, U.S.D.J. 1f

Appendix G--Opinion of U. S. District Court for the Southern District of New York, by Morris E. Lasker, U.S.D.J. 1g

APPENDIX C--ORDER OF AFFIRMANCE BY U. S. COURT OF APPEALS FOR REASONS STATED IN RODRIGUEZ v. COMPASS SHIPPING CO., LTD., ET AL.

United States Court of Appeals

SECOND CIRCUIT

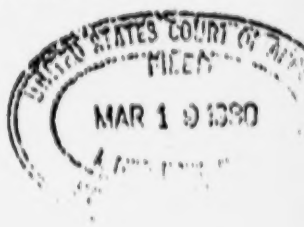
At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of March, one thousand nine hundred and eighty.

Present: HONORABLE STERRY R. WATERMAN,

HONORABLE LEONARD P. MOORE,

HONORABLE WALTER R. MANSFIELD,

Circuit Judges.



SRECKO BARULEC,

Plaintiff-Appellant,

-against-

OVE SKOU, R.A.,

Defendant-Appellee.

Docket No. 79-7630

The judgment of the district court is affirmed for the reasons stated in our opinion in the case of Frederico Rodriguez v. Compass Shipping Co. Ltd. and Djakarta Lloyd, P.N., Docket No. 79-713 ___ F.2d ___.

Sterry R. Waterman, U.S.C.J.

Leonard P. Moore, U.S.C.J.

Walter R. Mansfield, U.S.C.J.

APPENDIX D--ORDER OF AFFIRMANCE BY U. S. COURT OF APPEALS FOR REASONS STATED IN RODRIGUEZ v. COMPASS SHIPPING CO., LTD., ET AL.

United States Court of Appeals

SECOND CIRCUIT

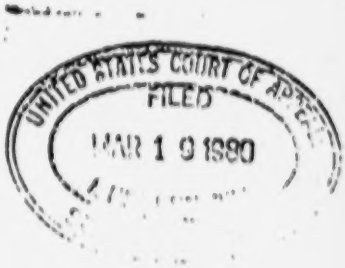
At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of March, one thousand nine hundred and eighty.

Present: HONORABLE STERRY R. WATERMAN,

HONORABLE LEONARD P. MOORE,

HONORABLE WALTER R. MANSFIELD,
Circuit Judges.

79-7632



LUIS PEREZ,

Plaintiff-Appellant,

-against-

ARYA NATIONAL SHIPPING LINE, LTD.,

Defendant-Appellee.

Docket No. 79-7632

The judgment of the district court is affirmed for the reasons stated in our opinion in the case of Frederico Rodriguez v. Compass Shipping Co. Ltd. and Djakarta Lloyd, P.N., Docket No. 79-7132 ___ F.2d ___.

Sterry R. Waterman, U.S.C.J.

Leonard P. Moore, U.S.C.J.

Walter R. Mansfield, U.S.C.J.

APPENDIX E--OPINION OF U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, BY ROBERT L. CARTER, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERICO RODRIGUEZ,

Plaintiff,

- against -

77 Civ. 3378 (RLC)

#47598

COMPASS SHIPPING COMPANY LTD. and D. JAKARTA LLOYD P.N.,

Defendants.

APPEARANCES

ZIMMERMAN & ZIMMERMAN, ESQS.
160 Broadway
New York, New York
Attorneys for Plaintiff
Edward D. Lory, Esq.
Of Counsel

WALKER & CORSA, ESQS.
25 Broad Street
New York, New York
Attorneys for Defendants
Joseph T. Stearns, Esq.
Of Counsel

U.S. DISTRICT COURT FILED SEP 13 1978 S.D. OF N.Y.

CARTER, D. J.

O P I N I O N

Plaintiff is a longshoreman. On September 4, 1973, as an employee of the stevedoring company International Terminal Operating Co., Inc. ("International"), plaintiff was working in Hatch No. 2 on the S.S. South Breeze, docked in Brooklyn, New York, unloading a shipment of coffee. The S.S. South Breeze was then owned by defendant Compass Shipping Company ("Compass") and was being operated under a bareboat charter by defendant D. Jakarta Lloyd ("Jakarta"). According to the plaintiff, he injured himself when, in the course of leaving work for the day, he climbed up the ladder from Hatch No. 2 and, upon reaching the deck of the ship, put his foot into a hole above the ladder which descended into the adjacent Hatch No. 3.

In the present action, Compass moves to dismiss the action against it on the ground that an earlier suit between plaintiff and Compass concerning the same events was dismissed by Judge Bonsal of this court. In addition, both Compass and Jakarta move for dismissal on the ground that, under the facts of this case, plaintiff's claim for relief against the defendants was assigned to his employer, International, by virtue of the provisions of 33 U.S.C. § 933(b). Lastly, both defendants move for summary judgment under F.R.Civ.P. 56. For the reasons set forth below, the motion based on Judge Bonsal's order of dismissal is denied, determination of the motion based on 33 U.S.C. § 933(b) will await the completion of the discovery specified in this opinion, and the motion for summary judgment is denied.

Judge Bonsal's Order of Dismissal

On June 2, 1976, plaintiff filed a suit in this district concerning the alleged accident of September 4, 1973, and the action was assigned to Judge Bonsal. Only Compass, the shipowner, was named as a defendant. A pre-trial conference was held before the Judge on February 28, 1977, at which time Compass revealed to the court and plaintiff that when the events in question allegedly occurred, the S.S. South Breeze was under the exclusive control of Jakarta, who had chartered the vessel. Compass argued that under these circumstances, it was not a proper party-defendant on the theory that it could not possibly be liable for events which occurred when the vessel was under the dominion of another. According to the defendant, plaintiff agreed that Compass was improperly named as a defendant. In

any case, an order of discontinuance was signed at the conference. The order states simply that "it is ORDERED that the above entitled action be and hereby is discontinued without costs to either party," and is dated and signed by Judge Bonsal. Underneath that signature is the statement "I hereby consent to the entry of this proposed order," followed by the signature of the attorneys of both plaintiff and defendant. Handwritten across the bottom is "30 Day Order. Extended an additional 30 Days (3/28/77)." The apparent purpose of this order was to permit plaintiff time to confirm defendant's assertion that the vessel had been chartered to Jakarta, after which the action against Compass was to be discontinued. After the conference, plaintiff apparently reconsidered his position with regard to the scheduled discontinuance, for on March 18, 1977, he

moved to have the order of discontinuance vacated and for permission to add Jakarta as a defendant in the pending action. The motion seems to have been denied, for plaintiff does not now contest that his earlier action was dismissed by virtue of the February 28, 1977 order.

Without reference to statute, rule, precedent, or explanation, Compass claims that the present action against it is barred by Judge Bonsal's order of discontinuance. In like manner, plaintiff asserts that that order was "without prejudice." For reasons not alluded to in the papers before the court, plaintiff is correct.

Rule 41(a) of the Federal Rules of Civil Procedure provides that unless otherwise indicated in the dismissal, a voluntary dismissal of an action is without prejudice. This is so whether the dismissal is accomplished by plaintiff's

filing of a notice of dismissal before an answer or a motion for summary judgment is served (F.R.Civ.P. 41(a)(1)(i)), by stipulation among all parties (F.R.Civ.P. 41(a)(1)(ii)), or by order of the court (F.R.Civ.P. 41(a)(2)). The dismissal of plaintiff's earlier action was voluntary: plaintiff consented to it. The consequent effect of Judge Bonsal's order was that the dismissal it directed was without prejudice. That effect is not altered by the fact that subsequent to the signing of the order plaintiff changed his mind and decided he wished to preserve the action and add a new party-defendant. Because plaintiff consented to the dismissal at the time the order was signed, the automatic effect of the order was that the dismissal was without prejudice, and there is no indication that Judge Bonsal ever determined the merits of Compass' argu-

ment concerning its liability to plaintiff. It would be contrary to justice and good sense if the mere fact of plaintiff's later and strategically motivated opposition to dismissal mechanically transformed Judge Bonsal's order into an adjudication of the merits of plaintiff's claim against Compass. The present action against Compass is not barred by the discontinuance of plaintiff's earlier action.

Section 933(b)

Under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("the Act"), a longshoreman who is injured in the course of his employment is entitled to compensation payments from his employer. The liability of the employer for this compensation is to the exclusion of all other liability of the employer, 33 U.S.C. § 905, but the injured

longshoreman retains the right to sue any other person who may be responsible for his injuries. 33 U.S.C. § 933(a). Section 933(b) provides, however, that

> "[a]cceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board [§ 921(b)] shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

It is defendants' contention that under the terms of this subsection, plaintiff no longer has any claim for relief against them.

Although the record does not present an overly detailed history of plaintiff's compensation claim, it is apparent that following his injury, he made a claim against his employer and that the claim caused some form of dispute requiring the attention of the Office of Workers' Com-

pensation Programs ("OWCP") of the United States Department of Labor, for on November 4, 1974, the adjudication of plaintiff's claim before that agency was settled. The settlement is embodied in an OWCP form and recites that "[w]e, the undersigned, having attended an informal conference, and having received a copy of the signed agreement, in this case on 11/4/74, agree, by the issuance of a Compensation Order, to the following disposition." The settlement then indicates the specifics of that disposition,[1] and concludes: "The employer-carrier shall make payment promptly following the conference, without regard to the receipt of the formal compensation order, in accordance with Section 702.315(a) of the Regulations," presumably meaning 20 C.F.R. § 702.315(a). The document is signed by the plaintiff, his representative, a rep-

resentative of the employer and the "claims examiner." The "informal conference" from which the settlement arose is the agency's preferred means of disposing of disputes concerning compensation claims. 20 C.F.R. §§ 702.301, 702.311. Section 702.315(a), to which the settlement refers, directs in part that

> "[f]ollowing an informal conference at which agreement is reached on all issues, the deputy commissioner shall embody the agreement in a formal compensation order, to be filed and mailed .... [W]hen the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, ... such action shall be commenced immediately upon becoming aware of the agreement, and without regard to the receipt of the formal compensation order."

Despite, however, the implicit assumption of the settlement and the explicit command of the regulation, no "formal compensation order" was ever issued.[2]

Plaintiff does not dispute that he received compensation for his injuries from

his employer, or that he instituted suit against the defendants more than six months after the settlement agreement or his receipt of the compensation. What is contested is whether the settlement constituted "an award in a compensation order filed by the deputy commissioner ...."[3] For, as the statute makes clear, mere acceptance of compensation, absent an "award", does not effect a statutory assignment of the injured party's claim.[4] E.g., Grasso v. Lorentzen, 149 F.2d 127, 129 (2d Cir.), cert. denied, 326 U.S. 743 (1945); Tartaglio v. Cunard White Star, 56 F. Supp. 55 (S.D.N.Y. 1944) and cases cited therein. See also American Stevedores, Inc. v. Porello, 330 U.S. 446, 454 (1946); Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097, 1101-2 (4th Cir. 1977).

Plaintiff's initial argument in this regard is that the settlement agreement does not satisfy the statutory requisites of an "award" because it was signed only by a claims examiner, and not by a Deputy Commissioner. This position is not without some support, as several cases have held that a document signed by a claims examiner is not a § 933(b) award. Grasso v. Lorentzen, supra, 149 F.2d 127, 129, aff'g 56 F. Supp. 51 (S.D.N.Y. 1944); Roeben v. United States, 113 F. Supp. 732 (D.N.J. 1953); Romano v. United States, 90 F. Supp. 15 (S.D.N.Y. 1950); Sessa v. Weeks Stevedoring Co., 56 F. Supp. 50 (S.D.N.Y. 1943). This literal reading of the statute seems to have been motivated by concern about the harsh consequences for the injured employee of finding that an assignment of his claim has occurred.

See Sessa v. Weeks Stevedoring Co., supra, 56 F. Supp. 50, 51.

However well-meaning the rule adopted by these decisions may be, it is at odds with the way in which administrative agencies perform their functions and the legislative purpose underlying the adoption of the "under an award" requirement in 1938, see note 4, supra. Accordingly, we refuse to apply such a rule here. By regulation, the deputy commissioner is empowered to delegate his duties with regard to disputed compensation claims, and the delagee of these duties is fully authorized to "perform the duties set forth below assigned to the deputy commissioner," 20 C.F.R. § 702.312. There is no reason to believe that the claims examiner who presided over the informal conference in this case was not then the deputy commissioner's delagee. Nor is there reason to believe

that this normal principle of administrative law is not operable in the context of a § 933(b) award proceeding. The ordering of compensation by a claims examiner or any other delagee of the deputy commissioner, as well as by a deputy commissioner himself, fully satisfies the purpose of the award requirement, which is solely to insure the injured person an opportunity to consider fully the consequences under § 933(b) of accepting compensation before those consequences are incurred. See H.R. Rep. No. 1945, 75th Cong., 3 Sess. (1938), quoted in Iaria v. Silver Line, Ltd., 56 F. Supp. 42, 44 (S.D.N.Y. 1943), and Cupo v. Isthmian S.S. Co., 56 F. Supp. 45, 47 (S.D.N.Y. 1941). No statutory purpose is furthered by requiring the endorsement of an actual deputy commissioner on an award.

Plaintiff's second contention is that the settlement agreement is not a § 933(b) compensation order because it is not a "formal order." It is now long settled that a "formal" order is not a necessity; an informal "equivalent" of an order is sufficient. Toomey v. Waterman S.S. Corp., 123 F.2d 718, 721 (2d Cir. 1941). See Liberty Mutual Insurance Co. v. Ameta & Co., supra, 564 F.2d 1097, 1101-03;[5] Grasso v. Lorentzen, supra, 149 F.2d 127, 129. Moreover, it is manifest that the settlement agreement is a compensation order for all intents and purposes. It is apparent from the agreement itself that the parties were determining the terms of a compensation order, which order, it was anticipated, was to issue shortly thereafter. Upon signing the agreement, it was the duty of the employer to begin making compensation payments immediately, and it

was the duty of OWCP to memoralize the agreement in a more formal document. While the agency's failure to perform this duty may have consequences for OWCP's internal record-keeping, it clearly was of no significance to the understanding or actions of the parties. There is thus no reason why this technical administrative lapse should be permitted to control the legal significance of the settlement agreement. That agreement fulfills the purpose of the award requirement, and is a compensation order within the meaning of § 933(b).

Relying on Potomac Electric Power Co. v. Wynn, 343 F.2d 295 (D.C. Cir. 1965), plaintiff argues that notwithstanding the fact of receipt of compensation under an award, an injured person may still bring an action against the third-party tortfeasor "whenever it is evident that the employer-assignee, for whatever reason,

does not intend to bring suit." Potomac Electric Power Co. v. Wynn, supra, 343 F.2d at 298. Plaintiff contends that by its inaction, the employer-assignee waives "the protection offered by statutory assignment." Affirmation in Opposition, p. 4. Though this position has strong appeal in terms of policy considerations, it must be rejected.

By virtue of the assignment which it decrees, § 933(b) places the claim for relief against a third party in the hands of the employer who provides its injured employee with compensation. This device serves two purposes. First, it enables the compensating employer to control directly the potential suit by which the employer may recoup from the alleged third-party tortfeasor the sums expended as compensation payments. Second, it permits the interested party with the

greater financial and legal resources to prosecute the claim for the benefit of both the employer and the employee.[6] Czaplicki v. The S.S. Hoegh Silvercloud, 351 U.S. 525, 531 (1956). The assignment device also has a significant drawback: in the apparently frequent case where the employer-assignee does not, in fact, institute an action, the injured employee must helplessly watch "his" claim for relief languish, to the benefit of no one but the alleged tortfeasor.

It may be argued that the purposes of the § 933(b) assignment could also have been satisfied and this drawback avoided if Congress has eschewed the concept of "assignment." Congress could have, and perhaps should have, directed that after the receipt of compensation under an award, both the employee and the employer would have the right to prosecute the claim

against the third party. In that case, each party would be in a position to protect its own interests, by bringing suit if it so wished, but if it did not, the rights of the other party would not thereby be foreclosed. Indeed, it would not be inconsistent with the purposes of the section to interpret the statute in this manner. But Congress did not choose that route; it directs instead that the claim be assigned from one party to another. And, with one exception, every relevant case that research has revealed has read § 933(b) literally and given the assignment notion its traditional meaning. For example, the Second Circuit has twice upheld the dismissal of complaints by injured employees on the ground that, by virtue of the statutory assignment, the claim was no longer theirs to prosecute. Sabol v. Merritt Chapman & Scott Corp., 241 F.2d 765 (1957);

Toomey v. Waterman S.S. Corp., supra, 123 F.2d 718. The Supreme Court has given the statute the same reading, describing § 933(b) as "giving the assignee exclusive control over the right of action." Czaplicki v. The S.S. Hoegh Silvercloud, supra, 351 U.S. at 531. See also H.R. Rep. No. 1945, 75th Cong., 3d Sess. (1938), supra, accompanying the 1938 amendments to the Act, discussed in note 4, supra (acceptance of compensation "result[s in the] loss of right to bring suit in damages against the third party"); Di Somma v. N.V. Koninklyke Nederlandsche Stoomboot, 188 F. Supp. 292, 294 (S.D.N.Y. 1960) (van Pelt Bryan, J.); Currant v. Eastern S.S. Lines, Inc., 77 F. Supp. 9 (D. Mass.), aff'd on the opinion below, 170 F.2d 148 (1st Cir. 1948). With the exception of the decision of the Court of Appeals for the District of Columbia Circuit in Potomac Electric

Power Co. v. Wynn, supra, the courts have universally construed § 933(b) to mean that, in the absence of special circumstances discussed below, after the assignment, the employer-assignee alone has the right to bring suit.

Against this array of authority stands Potomac Electric which held that the employee may bring a suit whenever it is clear that the employer, for whatever reason, will not. This view has not been adopted by subsequent decisions in other jurisdictions. See McClendon v. Charente Steamship Co., 348 F.2d 298, 303 (5th Cir. 1965): Bandy v. Bank Line Ltd., 442 F. Supp. 882, 886 (E.D. Va. 1977) (Potomac Electric rule rejected "as entirely inconsistent with the plain language of 33 U.S.C. § 933(b)"). I must also decline to follow it. The Potomac Electric court had two grounds of decision. It pointed out that

precluding the injured employee from suing himself when the employer does not wish to proceed on the claim would serve no apparent statutory purpose. As indicated above, I agree, but, as also indicated, the uniform construction that has been given the statute and the rule that Congress apparently intended to adopt requires precisely that result. The court also relied on certain amendments to the Act made in 1959,[7] which, it argued, evidenced a Congressional desire "to facilitate the employee's recovery against the third party." 343 F.2d at 298. It would be inconsistent with this purpose, the court argued, to place unpurposeful barriers in the path of the employee who seeks to vindicate his claim. With all respect, however, I believe that the conclusion drawn by the court is broader than warranted. Whatever other benefits they may have bestowed upon em-

ployees, the 1959 amendments did not alter the underlying structure of § 933(b); both before and after 1959, the occurrence of certain events constitutes an "assignment" of the claim from employee to employer. Nor is there any reason to believe that Congress meant, obliquely, to change what had theretofore been thought to be the meaning of that term.

Although this court is not free to accept the broad argument of Potomac Electric, there is in fact a more limited, but well developed, exception to the rule that the employee cannot sue once his claim has been assigned to the employer. In Czaplicki v. The S.S. Hoegh Silvercloud, supra, the Court determined that, notwithstanding the fact of the assignment, the employee can still bring suit if, because of a conflict of interest between the assignee and the employee, the assignee did not

press the claim. The conflict in Czaplicki was of a particular and infrequent sort: the employer's compensation insurance carrier (which, as subrogee of the employer's rights on the assigned claim, § 933(h), was the proper party to bring suit on those rights, Czaplicki, supra, 351 U.S. at 529) was also the liability insurer for one of the third parties subject to suit. As a result, the employee's "rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced," Czaplicki, supra, 351 U.S. at 530; thus, an action by the employer's subrogee would have been, in effect, an action against itself. Under those circumstances, the employee was permitted to sue on the claim that was no longer technically his.

Although the Court in Czaplicki appeared to base its decision on the unique facts of that case, the "conflict of interest" exception to § 933(b) it announced was quickly and widely expanded by the lower courts. E.g., McClendon v. Charente Steamship Co., supra; Johnson v. Sword Line, Inc., 257 F.2d 541 (3d Cir. 1958); Allen v. United States, 235 F. Supp. 950 (N.D. Cal. 1963), aff'd on other grounds, 338 F.2d 160 (9th Cir. 1964), cert. denied, 380 U.S. 961 (1965); DiSomma v. N.V. Koninklyke Nederlandsche Stoomboot, supra.[8] This expansion was primarily based upon the realization that the doctrine of Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp., 350 U.S. 124 (1956), created an inherent conflict of interest in many situations in which the employer was a stevedoring company and the third party subject to suit was the owner of the ves-

sel upon which the injury occurred. In Ryan, the Court determined that

> "a vessel owner found liable to a longshoreman injured as a result of the unseaworthy condition of the vessel was entitled to recover damages, when appropriate, from the stevedore under a theory that by a breach of the warranty of workmanlike service the stevedore or its employees caused or contributed to cause the condition on the vessel which gave rise to the longshoreman's recovery."

Bandy v. Bank Line Ltd., supra, 442 F. Supp. at 884. The practical effect of this doctrine was that "the assignee employer [was put] in a position where by suing the vessel owner to recoup its compensation payments it exposed itself to possible claim for indemnification of a larger judgment against the vessel owner." Ibid. Under these circumstances, an employer was extremely unlikely to press the claim of its employee.

In 1972, the Ryan doctrine was legislatively overruled; an employer is no

longer liable to a vessel owner for any damages recovered by an employee in a third party action. 33 U.S.C. § 905(b). The present question is thus the current state of the conflict of interest exception after the 1972 amendment to the Act.

This issue has been well and extensively analyzed by Judge Clarke in Bandy v. Bank Line Ltd., supra, and I am in basic accord with his conclusion. Although the grounds of decision of many of the post-Czaplicki cases has been severely undercut by the 1972 amendments, which eliminated a specific potential conflict, these changes do not affect the broader principle which underlies both Czaplicki and its progeny: the fact of a statutory assignment should not prevent the employee from doing so. Nor is there any reason to limit application of the Czaplicki principle to the particular facts

of that case.[9] Consequently, if plaintiff's employer-assignee suffered under the burdens of a conflict of interest as the holder of plaintiff's claim, defendants' motion to dismiss under § 933(b) must be denied.

To date, the parties have not addressed themselves to the conflict of interest issue. It is thus not possible to resolve this question on the present record. The parties will therefore be granted an opportunity, if they so wish it, to undertake discovery on this issue, to be completed within 60 days of the date of this opinion. Plaintiff will bear the burden of persuasion on the conflict issue when defendant's motion to dismiss is ultimately decided. Bandy v. Bank Line Ltd., supra, 442 F. Supp. at 886-87.[10]

Summary Judgment

Although neither side has submitted a statement of material facts which are allegedly disputed or allegedly not in dispute, as required by Rule 9(g) of the General Rules of this court, the circumstances surrounding plaintiff's accident are relatively clear from his deposition testimony. According to plaintiff, on the day in question, he was working as a longshoreman in the lower hold of No. 2 Hatch. Access to the hold was by way of a vertical ladder attached to the bulkhead separating Hatch No. 2 from Hatch No. 3. As I understand it, the ladder leads from the floor of the hold to a small hole in the main deck in an area enclosed by a small structure called the masthouse. Also in the masthouse, and apparently within a foot or two of the hole for the ladder from Hatch No. 2, is the

hole for the ladder for Hatch No. 3. At the end of the work day, plaintiff and his co-workers climbed up the ladder. As plaintiff emerged from the hole into the masthouse, he grabbed onto a bar attached to a wall and put his foot on the deck. He placed his left foot, however, in the hole for the No. 3 Hatch ladder; the resulting jerk injured him. It is plaintiff's contention that defendants were negligent with regard to his safety in that the lighting in the masthouse was dangerously inadequate and that the arrangement of the manholes in the masthouse was hazardous.

At this particular moment, the law in this circuit regarding the respective responsibilities of the vessel owner/charterer and the stevedoring company for the safety of the longshoreman is unsettled. Compare Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798 (2d Cir. 1978) with Canizzo

v. Farrell Lines, Inc., No. 77-7292 (2d Cir. June 2, 1978) and Lopez v. A/S D/S Svendborg and D/S of 1912 A/S, No. 78-7046 (2d Cir. July 24, 1978). But whatever the appropriate legal standard may be, summary judgment cannot be granted in this case because there are material issues of fact which are presently unresolved.

With regard to plaintiff's contention concerning the lighting in the masthouse, defendants argue, first, that "this court might safely conclude" there was sufficient natural lighting in the masthouse at the time of the accident. I cannot accept this invitation, for the record at present is skimpy, and the state of the lighting at any one place and time and its "sufficiency" in terms of personal safety are quintessentially issues of fact. Second, relying on Cox v. Flota Mercante Grancolombiana, S.A., supra, defendants

argue that the responsibility for assuring the longshoremen adequate lighting in the masthouse was upon the stevedore and not them. But resolution of this contention, too, requires a factual inquiry. Even under the Cox standard, the division of responsibility between stevedore and owner depends on the facts of each case, and the present record in this one reveals too little to permit me to absolve the vessel owner and charter of any responsibility to the longshoremen for the lighting in the masthouse.[11]

For similar reasons, summary judgment cannot be granted for defendants on plaintiff's argument regarding the arrangement of the manholes in the masthouse. Defendants' contention here is that there could be no finding of negligence since, as plaintiff stated at his deposition, the layout in the masthouse was not unusual.

But it is a commonplace that adherence to the usual practice of an industry, by itself, is not a complete defense to a charge of negligence. See, e.g., City of New York v. McAllister Brothers, Inc., 299 F.2d 227, 228 (2d Cir. 1962); Kane v. Branch Motor Express Co., 290 F.2d 503, 507 (2d Cir. 1961); Gulisano v. American Export Lines, Inc., 212 F. Supp. 809, 811 (S.D.N.Y. 1962) (Cashin, J.). Whether a given practice is negligent is to be determined by a jury, not by the industry which practices it.

Conclusion

The motion for summary judgment is denied. The motion to dismiss based on an earlier order of dismissal by Judge Bonsal is also denied. Decision on the motion to dismiss based on 33 U.S.C. § 933(b) is reserved, pending discovery,

to be completed within 60 days of this opinion.

IT IS SO ORDERED.

Dated: New York, New York
September 12, 1978

ROBERT L. CARTER
U.S.D.J.

FOOTNOTES

1. The total agreed-upon compensation was $3,610.21, from which was subtracted the sum which had been previously paid and a sum for the "approved fee," leaving a balance due to plaintiff of $2,623.03.

2. At oral argument on the instant motions, a copy of a letter from an Acting Deputy Commissioner of OWCP to the attorneys who represented plaintiff before OWCP, dated May 22, 1978, was submitted to the court. The letter was in response to an inquiry whether the settlement agreement "constitutes a Formal Order." OWCP's response was that "[r]eview of our file shows ... that the parties had stipulated to the issues on the claim. The self-insured employer voluntarily made payment of the compensation in accordance with the stipulations. To the present, a Formal Order has not been issued."

3. In addition, plaintiff argues that the proper interpretation of § 933(b) is that the injured person may bring suit, notwithstanding the statutory assignment, whenever it is evident that the assignee does not itself intend to bring suit. This contention is discussed in detail below.

   Plaintiff also asserts, in passing, that "33 U.S.C. 933(b) was not designed to protect third parties such as the defendants herein from suit." I presume that the argument hinted at here is that third parties do not have

standing to assert the assignment of the claim from the injured person to his employer. No authority is cited in support of this proposition, nor has research uncovered any, other than an intimation to that effect contained in Roeben v. United States, 113 F. Supp. 732, 735 (D.N.J. 1953). Indeed, several courts have sustained the § 933(b) assignment of claim defense even though it was raised by the non-assignee "third party." Sabol v. Merrit Chapman & Scott Corp., 241 F.2d 765 (2d Cir. 1957); Currant v. Eastern S.S. Lines, Inc., 77 F. Supp. 9 (D. Mass.), aff'd on the opinion below, 170 F.2d 148 (1st Cir. 1948). See also DiSomma v. N.V. Koninklyke Nederlandsche Stoomboot, 188 F. Supp. 292, 294 (S.D.N.Y. 1960) (van Pelt Bryan, J.) (dicta). Moreover, in the numerous other cases in which a non-assignee defendant has asserted the § 933(b) assignment as a defense, there is no indication that the non-assignee lacked standing to assert the assignment. See, e.g., Czaplicki v. The S.S. Hoegh Silvercloud, 351 U.S. 525 (1956); McLendon v. Charente Steamship Co., 348 F.2d 298 (5th Cir. 1965); Potomac Electric Power Co. v. Wynn, 343 F.2d 295 (D.C. Cir. 1965); Johnson v. Sword Line, Inc., 257 F.2d 541 (3d Cir. 1958); Bandy v. Bank Line Ltd., 442 F. Supp. 882 (E.D. Va. 1977). Almost every opinion that has touched upon the assignment question has assumed that standing to assert the assignment was not limited to the assignee. Plaintiff's contention in this regard must be rejected.

4. The reverse was true before 1938. Until the statute was amended in that year, the simple acceptance of compensation did create an assignment of the claim. See American Stevedores, Inc. v. Porello, 330 U.S. 446, 454 n. 18 (1946).

5. I should note, however, that I cannot agree with the conclusion of Liberty Mutual that the events which occurred in that case constituted a statutory award.

6. If the employer's suit is successful, it must, after the deduction of its expenses and compensation payments, pay over to the employee 80% of the remaining recovery from the third party. 33 U.S.C. § 933(e).

7. At that time, the Act was amended to permit the employee to sue the third party even though he has received compensation under an award, as long as suit is instituted within six months of the award. Congress thereby gave the injured employee full opportunity for a limited time to pursue both the compensation and law suit remedies. Further, the Act was changed to permit the employer-assignee who does bring suit to retain 20% of any recovery from the third party in excess of the employer's expenses and compensation payments. See note 6, supra. This latter change was made to provide an incentive to the employer to prosecute the assigned claim with vigor.

8. For a thorough recounting of the genesis and evolution of the conflict of interest exception, see Bandy v. Bank Line Ltd., supra, note 3.

9. It may be, for example, that plaintiff's employer has been dissuaded from pressing the claim in favor of its employee out of fear of antagonizing its customer, the vessel charterer. See Valentino v. Rickners Rhederei, G.M.B.H., S.S. Etha, 552 F.2d 466, 469 (2d Cir. 1977).

10. The burden is properly placed on plaintiff because the issue is the applicability of an exception to a general rule that would operate, absent the exception, to bar plaintiff's suit, and there appears to be no reason to presume, after the demise of the Ryan doctrine, that the exception should be applied.

11. In any case, as indicated above, it is presently unclear whether the Cox decision is still the law of this circuit.

APPENDIX F--OPINION OF U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, BY MORRIS E. LASKER, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

LUIS PEREZ,

Plaintiff,

-against- 76 Civ. 3009

ARYA NATIONAL SHIPPING LINE, LTD.,

Defendant.
----------X

APPEARANCES:

ZIMMERMAN & ZIMMERMAN, ESQS.
160 Broadway
New York, New York 10038
Attorneys for Plaintiff
Of Counsel: MORRIS CIZNER, ESQ.

WALKER & CORSA, ESQS.
25 Broad Street
New York, New York 10004
Attorneys for Defendant
Of Counsel: JOSEPH T. STEARNS, ESQ.

LASKER D.J.

Luis Perez, a longshoreman, was injured in August, 1973, while working aboard a vessel owned by the defendant. In March, 1975, the Workmen's Compensation Board entered an order awarding Perez compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (LHWCA). Some fifteen months after the Board's action, Perez commenced this action against the shipowner, seeking damages for the personal injuries he suffered as a result of his accident.

I.

As amended in 1959, section 33 (b) of the LWHCA provides:

> "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless

> such person shall commence an action against such third person within six months of the award."

33 U.S.C. § 933(b). The shipowner moves to dismiss the complaint on the grounds that since Perez did not commence this action within six months of the Board's award, his cause of action was assigned to his employer, and he cannot maintain this suit. In response Perez cites Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956), which carved an exception to the mandate of section 33(b). The principal question presented here is not whether the exception remains viable, but who bears the burden of proving whether it applies or not in a given case.

Despite the assignment provided for by section 33(b), an employee retains an interest in the cause of action even after he loses the right to sue on it, since section 33(e) of the LHWCA, 33 U.S.C. § 933(e),

apportions any recovery secured by the employer between it and the employee. Section 33(e) allows the employer to keep out of any recovery it makes, the expenses it incurred in pressing the suit, expenses for medical care provided the employee, amounts paid or payable to the employee as compensation, and (as a further incentive to pursue its employee's claims vigorously) twenty percent of the balance. The remaining eighty percent goes to the employee.

Until the amendment of the LWHCA in 1959, the employee lost his right to sue immediately upon accepting compensation under an award, rather than six months later. See Pub. L. No. 86-171, 73 Stat. 391 (1959). This was the situation when the Supreme Court rendered its decision in Czaplicki. Noting that "[i]n giving the assignee exclusive control over the right of action...the statute presupposes

that the assignee's interests will not be in conflict with those of the employee, and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is a recovery," the Court construed section 33(b) as allowing an employee to sue in his own name "where there is a conflict of interest [and] the inaction of the assignee operates to defeat the employee's interest in any possible recovery." Czaplicki v. The Hoegh Silvercloud, 35 U.S. 525, 531 (1956).

This "conflict of interest" exception to the mandate of section 33(b) was broadened considerably by lower courts in response to Ryan Stevedoring Co. v. Pan-Alantic Steamship Corp., 350 U.S. 124 (1956). In Ryan, the Court held that a stevedore was liable to a shipowner for any portion of a recovery against the shipowner

by the stevedore's employee which was attributable to the stevedore's breach of its warranty of workmanlike performance. Id. at 132-34. As a consequence of this holding, stevedores were understandably reluctant to sue shipowners on behalf of their employees. The most that the stevedore could hope to recover would be its costs associated with the employee's injury, plus twenty percent of any remaining recovery. In instituting suit, however, the employer opened itself up to the possibility that it would have to indemnify its opponent for part or all of that recovery. The greater the stevedore's recovery, the greater its potential liability to the very party from whom it recovered. Recognizing that "[t]his conflict may well prevent the prosecution of the assignee's action with the vigor and zeal which would result in the maximum recovery for the employee," DiSomma v. N.V. Koninklyke

Nederlandsche Stoomboot, 188 F.Supp. 292, 296 (S.D.N.Y. 1960), many courts readily ruled that section 33(b) did not preclude an employee from suing on his own behalf. E.g., Potomac Electric Power Co. v. Wynn, 343 F.2d 295, 297 (D.C. Cir. 1965); Johnson v. Sword Line, Inc., 257 F.2d 541, 544-46 (3d Cir. 1958); Allen v. United States, 235 F. Supp. 950, 954 (N.D. Calif. 1963), aff'd 338 F.2d 160 (9th Cir. 1964), cert. denied, 380 U.S. 961 (1965); DiSomma, supra, 188 F.Supp. at 297.

The defendant shipowner does not argue that the conflict of interest exception is no longer viable. The question presented, rather, is who bears the burden of proving that a conflict does or does not exist. Perez relies on Potomac Electric Power Co. v. Wynn, 343 F.2d 295 (D.C. Cir. 1965). There the court held that "the employee may bring suit against a third party whenever

it is evident that the employer-assignee, for whatever reason, does not intend to bring suit." Id. at 298. An alternative approach is that announced in Bandy v. Bank Line Ltd., 442 F.Supp. 882 (E.D. Va. 1977), and followed in Rodriguez v. Compass Shipping Co., No. 77-3378 (S.D.N.Y. September 12, 1978). These cases, on which the defendant relies, hold that the employee bears the burden of proving that a conflict exists. 442 F.Supp. at 886-87; No. 77-3378, slip op. at 14. For several reasons, we find the latter alternative to be the sounder position.

First, the employee seeks the advantage of an exception to a statute which on its face clearly deprives him of the right to sue. In such circumstances, it is appropriate to require the employee to demonstrate that the exception would be appropriate. Second, Perez could have filed suit

within six months of the compensation award. He failed to do so, and now seeks, in effect, to extend his time in which to sue. When the conflict of interest exception originated in 1956, an employee who accepted compensation under an award immediately lost his opportunity to sue. The 1959 amendments to the LHWCA diminished the need for an exception to section 33(b): the employee can now avoid the adverse effects of any possible conflict of interest simply by filing suit within six months of the award. An employee who fails to do so should shoulder the burden of proving that he continues nonetheless to have a right to sue. Third, the 1972 amendments to the Act legislatively overruled the Ryan docutrine. See Pub. L. No. 92-576, § 18(a), 86 Stat. 1251 (1972) (codified as 33 U.S.C. § 905[b]). The solicitude towards employees reflected in the liberal application of the conflict of interest exception in cases such as Potomac

Electric Power Co. v. Wynn can be attributed largely to the unavoidable conflict of interest created by that doctrine. In view of the 1972 amendments, such solicitude is no longer warranted. Finally, the 1972 amendments substantially increased the compensation payable to an injured longshoreman. Id. § 5(a) (codified at 33 U.S.C. § 906). The compensation now available to a longshoreman is more nearly commensurate with his actual damages, and consequently it is appropriate to require the longshoreman to demonstrate his right to sue after he has already received compensation.

In sum, the employee bears the burden of showing that his employer's interests conflict with his own, and that out of self interest his employer will not properly press the claim. The hearsay affidavit submitted by Perez in an attempt to meet this burden cannot be accepted. See Fed.

R. Civ. P. 56(e). However, Perez is granted forty-five days from the filing of this memorandum within which to submit competent evidence establishing that a conflict of interests exists.

II.

Perez also claims that "[t]o grant shipowner's motion to dismiss would be against public policy, in violation of the intent of Congress and the purposes of Section 933 of the Longshoremen's and Harbor Workers' Act as amended."

The LHWCA is intended to provide covered employees the benefits of workmen's compensation, without depriving them of the right to be compensated for their injuries by negligent third parties, or eliminating the incentive for third parties to provide longshoremen a safe place to work. To prevent indirect recovery form the employer, the

1972 amendments to the LHWCA prohibit the employer from indemnifying third parties for damages recovered from them by employees. This ensures that the employer's only liability will be for workmen's compensation, and that it will not otherwise be liable in damages for injuries to its employees.

Perez argues that assignment of the employee's claims against third parties to the employer contravenes the purposes of the LHWCA because it deprives the employee of his right to compensation from negligent third parties and eliminates an incentive for third parties to avoid negligent conduct. Moreover, Perez contends that the employer, by foregoing a possible recovery against a third party, indirectly "indemnifies" the third party, and, citing Bloomer v. Liberty Mutual Insurance Co., 586 F2d 908 (2d Cir. 1978) and Cella Partenveederei M.S. Ravenna,

529 F.2d 15 (1st Cir. 1975), neglects its "obligation" under the LHWCA to husband its resources for payment of increased compensation benefits.

Whatever first-blush appeal these arguments may have, on reflection they are unpersuasive. First, whatever the consequences of a failure to sue, an employee who fails to sue within six months of accepting compensation under an award of the Workmen's Compensation Board is as responsible for that failure as an employer who neglects, for whatever reason, to pursue an assigned claim. Second, an employer's failure to recover from a third party for the third party's negligence is not the same thing as an employer's indemnifying a third party on the basis of the employer's own negligence or breach of warranty. The 1972 amendments were intended to ensure that employers would not be liable, not that third parties

would be. Finally, there is no reason to assume that an employer's failure to sue necessarily reflects a breach of an obligation, if any exists, to husband its resources. On the contrary, such a failure may mean merely that the chances of winning the case are too remote to warrant suit.

The defendant's motion to dismiss the action is denied, without prejudice to renewal after forty-five days.

It is so ordered.

DATED: New York, New York
April 17, 1979

MORRIS E. LASKER
U.S.D.J.

APPENDIX G--OPINION OF U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, BY MORRIS E. LASKER, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

SRECKO BARULEC,

Plaintiff,

-against-

78 Civ. 786(MEL)

OVE SKOU R.A.,

Defendant.
----------X

APPEARANCES:

ZIMMERMAN & ZIMMERMAN, ESQS.
160 Broadway
New York, New York 10038
Attorneys for Plaintiff
Of Counsel: MORRIS CIZNER, ESQ.

HAIGHT, GARDNER, POOR & HAVENS, ESQS.
One State Street Plaza
New York, New York 10004
Attorneys for Defendant
Of Counsel: RICHARD K. MATANLE, II, ESQ.
JOHN TORIELLO, ESQ.

LASKER, D.J.

The plaintiff, Srecko Barulec, a longshoreman, was injured on January 6, 1975, while assisting in the discharge of the M/S Mette Skou, owned by the defendant, Ove Skou R.A. Barulec received workmen's compensation from his employer until March 14th, when the employer determined that Barulec had fully recovered from his injuries. On March 25, 1975, Barulec filed a claim for additional compensation under the Longshoremen's and Harbor Workers' Compensation Act (LWHCA), 33 U.S.C. §§ 901-950, with the Office of Workmen's Compensation Programs (OWCP). Pursuant to the regulations implementing the LWHCA, a claims examiner convened an informal conference. See 20 C.F.R. §§ 702.311-.314 (1976). At the conference, Barulec and his employer reached an agreement settling Barulec's claim, and the agreement was memorialized

in a "Memorandum of Informal Conference" prepared and signed by the claims examiner.

A year later, on February 22, 1978, Barulec commenced this action against the shipowner, alleging that his injuries were caused by the shipowner's negligence, and seeking damages.

The shipowner moves to amend its answer to assert as a defense that any claim that Barulec may have had against it has been assigned to his employer pursuant to section 33(b) of the LHWCA, 33 U.S.C. § 933(b), because Barulec filed suit more than six months after accepting compensation "under an award in a compensation order filed by the deputy commissioner."[1] Id. Since leave to amend pleadings "shall be freely given when justice so requires," Fed. R. Civ. P. 12 (a), and shipowner's counsel filed this motion eleven days after receiving the records of Barulec's compen-

sation proceedings which provide the basis for the new defense sought to be asserted, the motion for leave to amend the answer is granted.

In the event leave is granted, the shipowner moves for summary judgment dismissing the complaint on the merits of the newly asserted defense. Barulec counters that even if the shipowner is permitted to interpose a defense of assignment, the assignment may not be effective in this case under the rule of Czaplicki v. The Hoegh Silvercloud, 351 U.S. 527 (1956).

Under the LHWCA as originally enacted in 1927,[2] an injured employee who accepted workmen's compensation from his employer lost his right to sue third parties, which was assigned by operation of law to his employer. In 1938 the Act was amended to provide that the employee's right to sue is assigned to his employer only when the employee accepts compensation "under an

award in a compensation order filed by the deputy commissioner or [Benefits Review] Board." Act of June 25, 1938, ch. 685, § 12, 52 Stat. 1164.[3]

> "As a result of the amendment there must now be some official action by the Deputy Commissioner establishing an award of compensation in order to make such acceptance an assignment of the employee's cause of action against a third party."

Grasso v. Lorentzen, 149 F.2d 127, 128-29 (2d Cir.) cert. denied, 326 U.S. 743 (1945). The shipowner contends that the intercession of the Office of Workmen's Compensation Programs, and the preparation of a "Memorandum of Informal Conference" embodying the terms of the settlement reached following the intercession, constitute sufficient "official action by the Deputy Commissioner" to amount to an award in a compensation order and consequently to establish an assignment of Barulec's claims, barring him from maintaining this action in

his own name.

Because the regulations implementing the LHWCA stress informal resolution of compensation disputes, see 20 C.F.R. § 702.301 (a), the OWCP often does not in fact issue such orders, see Intercounty Construction Corp. v. Walter, 422 U.S. 1, 4-5 & 4 n.4 (1975), even though the LHWCA contemplates, 33 U.S.C. § 919 (c), and the regulations effective at the time Barulec's claim was processed require, 20 C.F.R. §§ 702,315(a), .348 (1976),[4] that every claim submitted to the OWCP culminate in a formal order rejecting the claim or making an award on it. However, the absence of a formal order does not bar an assignment of an employee's claim under section 33(b). It has long been the law that informal official action, "equivalent to an order," suffices to trigger an assignment. Toomey v. Waterman S.S. Corp., 123 F.2d 718, 721 (2d Cir. 1941); accord, Liberty Mutual Insurance Co. v. Ameta & Co.,

564 F.2d 1097, 1102-03 (4th Cir. 1977); Grasso v. Lorentzen, 149 F.2d 127, 129 (2d Cir.), cert. denied, 326 U.S. 743 (1945); Rodriguez v. Compass Shipping Co., 456 F. Supp. 1014, 1020 (S.D.N.Y. 1978); Hernandez v. Costa Armatori, S.P.A., "Pia Costa," No. 76 Civ. 2300, slip op. at 3-5 (E.D.N.Y. March 30, 1979).

The question then, is whether the actions of the OWCP relating to Barulec's claim were "equivalent to an order" establishing an award of compensation. Barulec argues that they were not, because the deputy commissioner himself took no part in, and in no way ratified, those actions. Several early cases, which held that only action by the deputy commissioner himself can amount to a compensation order (formal or informal), support his argument. E.g., Grasso v. Lorentzen, 56 F.Supp, 51, 54 (S.D.N.Y. 1944), aff'd, 149 F.2d 127 (2d Cir.), cert. denied,

326 U.S. 743 (1945); Sessa v. Weeks Stevedoring Co., 56 F.Supp. 50, 51 (S.D.N.Y. 1943); see Lumber Mutual Casualty Insurance Co. v. Locke, 60 F.2d 35, 37 (2d Cir. 1932). For instance, in Sessa v. Weeks Stevedoring Co., supra, on facts nearly identical to those of the present case, the court held that an employee's right to sue third parties was not assigned under section 33(b) where a conference was held before a claims examiner and the disposition to the employee's claims at the conference recorded in a "Memorandum of Conference" prepared by the claims examiner. The court stated that "the determination or award, even though informal in character, [was] made by a claims examiner and there seems to be no authority in the statute for the award made by claims examiners." 56 F.Supp. at 51.

However, Sessa and the other cases relied on by Barulec were premised on out-

dated administrative practice. Modern practice, as indicated below, authorizes considerably greater delegation of authority than was permissible at the time those cases were decided. See Rodriguez v. Compass Shipping Co., 456 F.Supp. 1014, 1019 (S.D. N.Y. 1978); 1 K. Davis, Administrative Law Treatise § 3:17 (2d ed, 1978). The OWCP has formally adopted procedures for processing compensation claims that provide for the delegation of many of the deputy commissioner's statutory functions to others in the agency. The regulations in effect when Barulec's claim was processed provide:

> "Informal conferences shall be called by the deputy commissioner or his designee assigned or reassigned the case and held before that same person, unless such person is absent or unavailable. When so assigned the designee shall perform the duties set forth below assigned to the deputy commissioner."

20 C.F.R. § 702.312 (1976). Among the duties "set forth below" is that of preparing com-

pensation orders when claims are settled at the conference.

> "Following an informal conference at which agreement is reached on all issues, the deputy commissioner shall embody the agreement in a formal compensation order...."

Id. § 792,315. Whatever may have been the regulatory scheme when Sessa was decided, the regulations applicable to this case clearly authorize the claims examiner to make an award of compensation based on a settlement reached at an informal conference.

Barulec argues, however, that these regulations are invalid, because the functions of the deputy commissioner that they purport to delegate are discretionary, and cannot be delegated. He bases this argument on section 8(i) (A) of the LHWCA, which provides:

> "Whenever the deputy commissioner determines that it is for the best interest of an injured employee entitled to compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation,

> notwithstanding the provisions of section 915 (b) and section 916 of this title...."

33 U.S. § 908(i) (A). It is Barulec's position that the deputy commissioner's duty to determine whether a settlement is "for the best interest" of the employee is a personal one that cannot be validly assigned to another.

However, we conclude that section 8 (i) (A) relates only to settlements reached by the parties independently, and not to settlements worked out at an informal conference, such as that involved here. From its context, it is clear that the purpose of section 8 (i) (A) is to permit the deputy commissioner to approve settlements that would otherwise be outlawed by sections 15 (b) and 16 of the LHWCA, which invalidate agreements by an employee to waive his right to compensation, 33 U.S.C. § 915(b), and

"assignment, release, or commutation of compensation," id. § 916. This is the interpretation adopted by the OWCP and reflected in the implementing regulations. Compare 20 C.F.R. § 702.241 (1976) with id. §§ 702.311-.316.

The deputy commissioner's authority to award compensation based on a settlement reached at a conference arranged by the OWCP can reasonably be construed to be included under his general authority to "make or cause to be made such investigations as he considers necessary in respect of [a] claim.... [If no hearing is requested,] the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim." 33U.S.C. § 919 (c) (emphasis supplied). This provision expressly authorizes the deputy commissioner to delegate the function of investigating claims, and the regulations quoted above reflect that author-

ization. Nothing about the duties delegated suggests that they can or may be performed only by the deputy commissioner himself. An informal conference is the first stage of the OWCP's investigation "in respect of" a claim, a step designed to resolve "misunderstandings, clerical or mechanical errors, or mistakes of fact or law," 20 C.F.R. § 702.301 (1976), and to provide the parties an opportunity to amicably settle their dispute, id. § 702.315. The agency official who presides at such a conference may be called on to exercise good sense, tact, and diplomacy, but he is neither required nor authorized to impose a solution on the parties: if they do not reach a settlement at the conference, he can recommend one, but if they do not accept his recommendation the case is referred to an administrative law judge for a formal hearing. Id. § 702. 316. Since the deputy

commissioner's function at the conference does not involve a unilateral resolution of the merits of the dispute binding on the parties over their objection, it appears reasonable to conclude that his authority is delegable.[5] Such delegation cannot prejudice any party and yet decidedly facilitates operation of the system.

In sum, the OWCP processed Barulec's claim in accordance with its regular procedures, and duly confirmed a settlement which those procedures were designed to facilitate. The agency took official action with regard to the claim, and, as a consequence of that action, an informal award was made disposing of the claim. This is enough to trigger an assignment of the employee's right to sue third parties under section 33 (b).

Barulec argues, however, that even if the agency action relating to his claim is

sufficient to trigger an assignment of his right to sue third parties, no such assignment should be recognized here because this case falls within the exception to the mandate of section 33 (b) carved out by Czaplicki v. The Hoegh Silvercloud, 351 U. S. 525 (1965), which allows an employee to sue in his own name when there is a conflict between the employer/assignee's interest and the employee/assignor's interest. We have discussed at length the arguments that Barulec makes on this point in a recent case and concluded that although the "conflict of interest" exception is still viable, "the Employee bears the burden of showing that his employer's interests conflict with his own, and that out of self interest his employer will not properly press the claim." Perez v. Arya National Shipping Line, Ltd., No. 76 Civ. 3009, slip op. at 6 (S.D.N.Y. April 17, 1979).

Barulec has made no such showing, but, as in Perez, Barulec is granted forty-five days from the filing of this memorandum within which to submit competent evidence establishing that a conflict of interest exists.

For the reasons stated, the defendant's motion for leave to amend the answer is granted, and the defendant's motion for summary judgment dismissing this action is denied, without prejudice to a renewed motion to dismiss after forty-five days.

It is so ordered.

DATED: New York, New York
May 31, 1979

MORRIS E. LASKER
U.S.D.J.

1. "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

33 U.S.C. § 933 (b).

2. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33, 44 Stat. 1424 (1927).

3. Section 33(b) was amended again in 1959 to allow the employee to sue third parties within six months of an award. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391.

4. The regulations were amended in 1977. 42 Fed. Reg. 45, 303 (September 9, 1977).

5. Nothing in Intercounty Construction Corp. v. Walter, 422 U.S. 1 (1975), suggests the contrary.